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 11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 13 SAN JOSE DIVISION

14
 15 **ANTONIO JIMENEZ,**
 16 Petitioner,
 17 v.
 18 **BEN CURRY,**
 19 Respondent.

C 07-3904 JF

**RESPONDENTS' NOTICE OF
MOTION AND MOTION TO DISMISS;
SUPPORTING MEMORANDUM OF
POINTS AND AUTHORITIES**

Judge: The Honorable Jeremy Fogel

21 TO PETITIONER ANTONIO JIMENEZ, IN PRO SE:

22 PLEASE TAKE NOTICE that Respondent Ben Curry, Acting Warden at the Correctional
 23 Training Facility, moves this Court to dismiss the petition for writ of habeas corpus pursuant to
 24 Rule 2 of the Federal Rules Governing Habeas Cases, on the ground that Petitioner has failed to
 25 meet his burden of proof to show proper exhaustion of state court remedies. No hearing is
 26 requested. This motion is based on the notice and motion, the supporting memorandum of points
 27 and authorities, the petition for writ of habeas corpus, the court records in this action, and other
 28 such matters properly before this Court.

Not. of Mot. and Mot. to Dismiss; Mem. of P. & A.

Jimenez v. Curry
C 07-3904 JF

MEMORANDUM OF POINTS AND AUTHORITIES**PRELIMINARY STATEMENT**

Petitioner Antonio Jimenez is a California state inmate at the Correctional Training Facility, proceeding pro se in this habeas corpus action. Petitioner alleges that the Board of Parole Hearings (Board) violated his due process rights when it denied parole without the support of "some evidence" that he constitutes a current, unreasonable threat to public safety. (See generally Pet.) Petitioner also claims that the Board violated his due process rights by relying on static factors, such as the commitment offense. (*Id.*)

However, Petitioner fails to meet his burden of showing that he exhausted his federal claims in state court. In addition, Petitioner fails to allege a violation under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA permits federal courts to grant relief if a state court's decision is contrary to clearly established federal law. Here, Petitioner does not frame his federal claims as challenges to the state courts' decisions, but rather invites the Court to re-weigh the suitability evidence reviewed by the Board without citation to any federal law that permits this type of review. Accordingly, Respondent respectfully requests that the Petition be dismissed.

On February 29, 2007, this Court issued an Order to Show Cause why the Petition should not be granted. Pursuant to the Rules Governing Section 2254 Cases, Respondent moves to dismiss the Petition.

ARGUMENT**I.****THIS PETITION SHOULD BE DISMISSED BECAUSE PETITIONER FAILED TO MEET HIS BURDEN OF PROVING THAT HE EXHAUSTED HIS STATE JUDICIAL REMEDIES.**

A petitioner has the burden of proving that he exhausted his state remedies before filing his federal petition. 28 U.S.C. § 2254(b)(1)(A); *Darr v. Burford*, 339 U.S. 200, 218-19 (1950), *overruled on other grounds by Fay v. Noia*, 372 U.S. 391, 435 (1963) (overruling *Darr* "to the extent it may be thought to have barred a state prisoner from federal habeas relief if he had failed timely to seek certiorari from [the United States Supreme] Court from an adverse state

1 decision.”).

2 Here, Petitioner failed to show that he has properly exhausted his state judicial remedies
 3 because he does not provide any documentary evidence showing that he fairly presented his
 4 federal claims to a lower state court. *Rose v. Lundy*, 455 U.S. 509 (1982); *Gray v. Netherland*,
 5 518 U.S. 152 (1966). In fact, Petitioner does not state anywhere in his federal petition whether
 6 he filed any habeas petitions in any state court and was denied relief on his federal claims. Thus,
 7 because Petitioner neither alleges or proves that he exhausted his state court remedies, he fails to
 8 meet this limited burden of proof prior to seeking federal habeas relief. *Kim v. Villalobos*, 799
 9 F.2d 1317, 1320 (9th Cir. 1986) (merely attaching a state court petition satisfies the exhaustion
 10 requirement). Accordingly, his Petition must be dismissed.

11 **II.**

12 **PETITIONER FAILS TO ALLEGE RELIEF UNDER AEDPA.**

13 In addition, Petitioner fails to allege any basis for this Court to grant relief under AEDPA on
 14 either claim. Petitioner must show that the state court denials of his habeas petitions were
 15 contrary to, or involved an unreasonable application of, clearly established United States
 16 Supreme Court law, or that the denials were based on an unreasonable interpretation of facts in
 17 light of the evidence presented. 28 U.S.C. § 2254(d). Here, Petitioner fails to frame his
 18 argument in terms of the state court decisions, but rather invites this Court to consider the merits
 19 of the Board’s decision. However, the statute clearly states that a federal court may only grant
 20 relief on a habeas petition if the state court’s adjudication of the claim resulted in a decision that
 21 was contrary to or involved an unreasonable application of clearly established federal law, as
 22 determined by the Supreme Court of the United States. *Id.* Petitioner fails to allege or prove
 23 how the state courts’ decisions were contrary to or an unreasonable application of clearly
 24 established Supreme Court law, and thus, provides no basis for which this Court may grant relief.
 25 Accordingly, the Petition must be dismissed.

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CONCLUSION

2 The petition should be dismissed because Jimenez did not meet his burden of proving that
3 he exhausted his state court remedies before filing this petition. Jimenez also fails to show how
4 this Court can grant relief under AEDPA by stating how the state courts' decisions were contrary
5 to or unreasonable applications of clearly established federal law. As such, the Petition should be
6 dismissed.

Dated: April 25, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Jimenez v. Curry**

No.: **C 07-3904 JF**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 28, 2008, I served the attached

**RESPONDENTS' NOTICE OF MOTION AND MOTION TO DISMISS;
SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

**Antonio Jimenez, D-58095
Correctional Training Facility
P.O. Box 686
Soledad, CA 93960-0686
In Pro Per**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 28, 2008, at San Francisco, California.

L. Santos

Declarant


Signature